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# Earl Raymond Cantrell v. Commonwealth of Kentucky

Appellant's Brief 1976-SC-0349

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# APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-349

EARL RAYMOND CANTRELL — APPELLANT

VS. — APPEAL FROM JOHNSON CIRCUIT COURT
HON. W. D. SPARKS, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

# BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief For Appellant has been mailed, postage prepaid, to Hon. William B. Hazelrigg, Judge, Johnson Circuit Court, Johnson County Courthouse, Paintsville, Kentucky 41204; Hon. Eugene C. Rice, Commonwealth Attorney, 24th Judicial District, Paintsville, Kentucky 41204; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 8th day of June, 1976.

William A. Padgett

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## STATEMENT OF THE QUESTIONS PRESENTED

I.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE PROSECUTION TO INTRODUCE EVIDENCE OF ANOTHER CRIME WHICH WAS NOT CHARGED IN THE INDICTMENT?

II.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY RULING, OVER DEFENSE OBJECTION, THAT APPELLANT'S NINE-YEAR-OLD DAUGHTER WAS COMPETENT TO TESTIFY?

III.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE PROSECUTION, OVER DEFENSE OBJECTION, TO INTRODUCE INTO EVIDENCE A NONTESTIFYING WITNESS'S ALLEGED OUT-OF COURT STATEMENT, WHICH IMPLICATED APPELLANT, IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

## STATEMENT OF THE CASE

On January 23, 1974 appellant was indicted in the Johnson Circuit Court for the offense of rape of a female under twelve years of age in violation of KRS 435.080(1) (Transcript of Record, hereinafter designated as T.R., p. 2). According to the indictment, appellant on or about October 21, 1973 "did rape Judy Cantrell, a child under twelve years of age" (T.R., p. 2).

That same grand jury on January 31, 1974 returned a two-count indictment which alleged two additional rapes of Judy Cantrell on or about November 15, 1973 and December 15, 1973 (T.R., p. 4).

A preliminary hearing was conducted on January 11, 1974; Judge Ward of Johnson Quarterly Court found probable cause to believe that the charged offenses were committed and that appellant committed them (T.R., pp. 6-7). On motion of the Commonwealth Attorney, the two indictments were consolidated and appellant was tried on all three counts at one trial (T.R., pp. 12, 24). Contrary to his plea, appellant on September 12, 1974 was convicted of three counts of carnal knowledge of Judy Cantrell unlawfully and feloniously and against her will or consent or by force; he was given three life sentences by the jury (Transcript of Evidence, hereinafter designated T.E., pp. 73-74; T.R., p. 18).

The trial judge overruled appellant's motion for a new trial in an order entered December 6, 1974 (T.R., pp. 32-34). Final judgment was entered in appellant's case on December 6, 1974 (T.R., pp. 23-26).

Although a notice of appeal was filed on September 14, 1974 it appears from the record that the direct appeal of appellant's conviction was never perfected (T.R., p. 19).

On August 14, 1975 the Johnson Circuit Court granted appellant's motion pursuant to RCr 11.42 and ordered that appellant be granted a "belated appeal" of his conviction under Indictments No. 5916 and No. 5929 (T.R., p. 35). Appellant filed a Notice of Appeal on August 20, 1975 (T.R., p. 36).

On September 10 and 11, 1974 the jurors were selected for the trial of appellant (T.R., pp. 12-15). Trial commenced on September 11, 1974 with the opening statement of the Commonwealth Attorney, Hon. Eugene C. Rice (T.E., p. 2). Mr. Rice called Judy Cantrell, appellant's nine-year-old daughter, as his first witness (T.E., p. 2).

Before the oath was administered to Judy, the judge asked her to whom she would swear to tell the truth; Judy replied "To you" (Supplemental Transcript of Evidence, hereinafter designated S.T.E., p. 1). The judge then questioned her about who it is "above us all that we swear to help us"; she answered "God" (S.T.E., p. 1). Finally the judge inquired whether Judy understood about God and what he could do if someone swore something wrong (S.T.E., p. 1). Judy answered affirmatively (S.T.E., p. 1). Thereafter, Judy was sworn as a witness (S.T.E., p. 1)

Judy testified that on a certain occasion when she and her father were on a hill "fencing," her father took her clothes off and "stuck his thing in my thing" (T.E., pp. 3-4). She then answered, in response to questioning by the prosecutor, that she knew what a man's penis and a woman's female organs were; she said that it was her father's penis that he stuck in her and that she felt it inside her (T.E., p. 5).

The witness next testified that her father again inserted his penis inside her in the parking lot at S Mart while her mother and brother were in the store (T.E., pp. 6-7). Judy then related that her father did the same thing he had done on the two previous occasions at home in bed at a later date.

Responding to a question by the prosecutor, the witness said that this occurred after her mother disappeared (T.E., pp. 7-9). As Judy completed her testimony, the prosecutor asked her: "Did you ever see your mother alive after this last time that it happened?" Judy replied that she had not (T.E., p. 9).

Goldie Mae Castle, Judy's aunt, testified for the prosecution that at the end of October, 1974 Judy's mother told her that "somebody has been bothering Judy" (T.E., p. 21). Ms. Castle then related that she and Judy's mother examined Judy and observed bleeding from her female organs (T.E., pp. 21-22). The prosecutor questioned Ms. Castle about the "disappearance" of appellant's wife, Patsy Cantrell, and she commented that Mrs. Cantrell was found dead (T.E., pp. 22-23). Appellant's trial counsel objected to these questions about Mrs. Cantrell's death (T.E., p. 23); his objection was overruled (T.E., p. 23).

Mr. Rice, the prosecutor, then called B. J. Music, a Kentucky State Police detective, to the stand (T.E., p. 26). Mr. Music stated that he became involved with Judy after her mother was reported missing (T.E., p. 26). Appellant's counsel objected to questioning about Mrs. Cantrell's death and moved for a mistrial, but his motion was overruled (T.E., pp. 26-27). Detective Music noted that after he picked up a report of Dr. Parks' examination of Judy on January 7, he talked to Judy and then arrested appellant for rape (T.E., pp. 27-28). The prosecutor again resumed questioning Mr. Music about the disappearance of Mrs. Cantrell at some length; appellant's counsel objected strenuously (T.E., pp. 28-32).

Dr. D. S. Park testified for the prosecution that he examined Judy on January 2, 1974 and that her hymen was completely gone (T.E., pp. 33-34). He stated that it was somewhat unusual for a child of eight years not to have a hymen and that penetration of the vagina by a penis could cause the hymen to be

broken (T.E., p. 34). On cross-examination, Dr. Park acknowledged that there are many ways that the hymen can be destroyed besides intercourse (T.E., p. 35).

A little later, the Commonwealth recalled Judy who testified that her father told her not to tell anyone about the first two alleged rapes (T.E., pp. 38-39).

Emma King, an acquaintance of both appellant and his wife, testified for the Commonwealth. After a few background questions, the prosecutor asked her about Mrs. Cantrell's disappearance and inquired when the last time she saw Mrs. Cantrell alive was (T.E., pp. 43-44). Ms. King related that in late November of 1974 she, Mrs. Cantrell and appellant conversed at her home (T.E., p. 44). She said that appellant warned her to watch her daughter because someone had been bothering Judy (T.E., p. 44). The witness stated that Mrs. Cantrell accused appellant of being the offender and that appellant replied, "You shouldn't have said that" (T.E., pp. 44-45).

At the close of the prosecution's case, appellant's counsel moved for a directed verdict on the ground that there was no competent evidence that a crime had been committed (T.E., p. 48). The court overruled the motion (T.E., p. 49). Appellant's counsel then moved that the instructions of the court be limited to attempted rape because penetration was not proved; the court also overruled that motion (T.E., pp. 49-50).

Appellant called Robert McKenzie, constable of Johnson County, to the witness stand (T.E., p. 50). The witness stated that he took Judy to be examined by Dr. Frame sometime in December (T.E., p. 51). On cross-examination, the prosecutor asked whether that occurred after Mrs. Cantrell was missing (T.E., p. 51). Appellant's counsel objected to the question, but was overruled (T.E., p. 51).

Appellant then testified in his own behalf (T.E., p. 52). He stated that he never molested Judy in any way (T.E., p. 52). He specifically denied each of the three incidents charged (T.E., pp. 52-55). Appellant controverted Ms. King's testimony about his wife's accusing him of raping Judy (T.E., pp. 56-57).

On cross-examination, the prosecutor asked appellant why Mrs. King would lie and he replied that her grandson had lied about him in court and the case was being appealed (T.E., pp. 61-62). The prosecutor also referred to the disappearance of Mrs. Cantrell (T.E., pp. 62-62). Then the prosecutor launched into a series of questions about comments allegedly made by appellant to Detective Music after his arrest (T.E., pp. 63-65). The prosecutor read appellant's alleged answers to the questions; the gist of the alleged answers was that appellant admitted his wife accused him of raping Judy and threatened to "get the law" on him (T.E., pp. 63-65). Finally the prosecutor asked appellant if his wife's disappearance was related to the fact she was "about to blow the whistle on [him] as far as the police were concerned" (T.E., p. 67). Appellant's counsel objected to the question, his objection was overruled, and appellant answered the question in the negative (T.E., p. 67).

The trial concluded with closing arguments by appellant's counsel and the prosecutor (T..E., p. 73).

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE PROSECUTION TO INTRODUCE EVIDENCE OF ANOTHER CRIME WHICH WAS NOT CHARGED IN THE INDICTMENT.

On numerous occasions during the trial of appellant, the prosecutor questioned witnesses about the death of appellant's wife, an occurrence unrelated to the offenses for which appellant was indicted. This pattern of questioning by the prosecutor was obviously calculated to raise questions in the minds of

the jurors about appellant's involvement in his wife's death. It should be noted that prior to trial in the instant case appellant was convicted of voluntary manslaughter of his wife and sentenced to imprisonment for twenty-one years.

In order to present a clear picture of the improper questioning of the prosecutor it is necessary to review his method of interjecting evidence about Mrs. Cantrell's disappearance and death into appellant's trial. When Judy Cantrell had testified about two alleged incidents of rape by her father, the prosecutor asked:

> Q 62 Judy, did this ever happen again, after that?
>
> A Yes.
>
> Q 63 Did you remember that your mother disappeared?
>
> A Yeah.
>
> Q 64 Did it happen before or after your mother disappeared?
>
> A After my mother (T.E., pp. 7-8).

Shortly thereafter, the prosecutor asked Judy:

> A 78 Did you ever see your mother alive after this last time that it happened (T.E., p. 9)?

The impact of the prosecutor's improper questioning about Mrs. Cantrell's death even at this early point in the trial is demonstrated by this question posed to Judy by the juror.

> Did this happen after the mother was deceased, or before (T.E., p. 17)?

The prosecutor replied:

> That evidence will come later (T.E., p. 17).

While Ms. Castle, Judy's aunt, was testifying that her sister never took Judy to the doctor after she and Mrs. Cantrell discovered bleeding from Judy's female organs, the prosecutor and Ms. Castle had the following colloquy:

Q 21 Did she, to your knowledge, ever take Judy to the Doctor before she became deceased?

A No.

Q 22 Do you know when your sister was last seen, or when she disappeared?

HARRINGTON: Your Honor, I'm going to object to that, I don't see where it's pertinent in this case.

RICE: Well it has a relationship to the facts that I---

JUDGE: Well if you connect it up, I'll hold it, otherwise the jury will disregard it.

HARRINGTON: Show our exceptions.

Q 23 When did or did your sister disappear?

A It was the 10th of December.

Q 24 That's 1973?

A Uh-hu.

Q 25 And when is the next time you heard from her or about her after she disappeared?

HARRINGTON: We want to object.

A He come over on Tuesday night, hunting for her.

Q 26 Well I'm asking you when, from the time she disappeared, when is the next time that you had any actual knowledge of where she was or what happened to her?

A When they found her dead (T.E., pp. 22-23).

On direct examination of B. J. Music, a detective, the prosecutor inquired about the detective's contact with Judy:

Q 5 For what reason did you happen to come in contact with her?

A There was a report on the missing of her mother.

Q 6 Did you become involved in the matter of looking for her mother, or trying to find her mother?

A I did.

Q 7 And do you recall when you first made any contact with anyone out in the Redbush area?

HARRINGTON: We want to object, Your Honor. That's something that's an entirely different thing.

RICE: Well, Your Honor, this leads up to---

JUDGE: If you propose to connect it up, I'll hold it.

HARRINGTON: You're doing an awful lot of leading, Gene, but you never get no place.

JUDGE: Don't lead, but go ahead and let him answer, if you connect it up, I'll permit it to go.

HARRINGTON: Show our exceptions. Move to set aside the swearing of the jury.

JUDGE: Overruled (T.E., pp. 26, 27).

A little later, the prosecutor again led the questioning of Detective Music to the circumstances of Mrs. Cantrell's death:

Q 12 From your investigation, did you determine whether or not Patsy Loraine Cantrell was missing from the period of Janaury the 10th until approximately - excuse me, December the 10th until approximately January the 8th, 9th or 10th?

A Yeah, I determined that she was missing.

HARRINGTON: Objection, leading and has no connection.

WITNESS: She was reported missing on. . .

HARRINGTON: We want to object to these statements made in the presence of the jury. They have no connection with this case at all, that they've got him charged with.

JUDGE: I understand---

RICE: Yes, I think we'll connect it up, Your Honor.

JUDGE: I'll hold that, if it has any bearing.

HARRINGTON: Well the previous question, he was going to connect it up, but he stopped short, and he never did get it connected up.

JUDGE: Go ahead and let's see where he goes.

HARRINGTON: We want to object.

JUDGE: All right, overruled.

HARRINGTON: Except, and move to set aside the swearing of the jury.

JUDGE: Overruled.

Q 13 From your investigation, Detective Music, what period of time did you determine that Patsy Cantrell was missing?

A From on or about December the 9th until January the 8th.

HARRINGTON: Object.

JUDGE: Overruled.

HARRINGTON: Show our exceptions.

Q 14 And from your investigation was she missing from the home there where she and the defendant lived at the time that Judy has testified about her father sleeping with her?

A Yes sir.

HARRINGTON: Show our objections.

JUDGE: Overruled.

HARRINGTON: Exceptions (T.E., pp. 28-29).

The prosecutor persisted in improperly inquiring about Mrs. Cantrell's death during his questioning of Ms. King:

Q 18 Referring back to October or November of last year, do you remember when Earl Raymond Cantrell's wife, Patsy disappeared?

A Yes.

Q 19 And just before she disappeared, had they been out to visit with you, I mean speaking of Earl Raymond Cantrell and his wife, Patsy - had they been to visit you?

A Yes.

Q 20 Do you know about how long before she disappeared?

A Oh I don't know just exactly. They visited us all along.

Q 21 Well the last time that she visited with you, do you know whether it was a week or two weeks, or?

WITNESS: The last time she visited with us?

RICE: Yes.

A That's the 9th day of December, the last time she visited with us.

Q 22 And is that the last time you ever saw her alive?

A That's the last time I ever see'd her (T.E., pp. 43, 44).

When Robert McKenzie testified on direct that he thought he took Judy to Dr. Frame sometime in December, the prosecutor inquired unnecessarily on cross-examination:

Q 1 Was that after Patsy, Earl Raymond's wife, had been missing (T.E., p. 51)?

Appellant's counsel immediately objected, but was overruled (T.E., p. 51).

The prosecutor cross-examined appellant about any reasons Ms. King would have to lie about him and then queried:

Q 14 After your wife, Patsy was missing, did you make several trips back to Emma Kings to see if she knew anything, or what she might have known (T.E., p. 62)?

Appellant replied:

A That don't really concern this case that I can see (T.E., p. 62).

The questioning continued:

Q 15 Well did you go back and try to pump information out of her, to see what she might know?

A No.

HARRINGTON: We object, Your Honor, to arguing with the witness.

JUDGE: Well if you're setting up any kind of predicate on that, I'll hold it. Go ahead (T.E., p. 62).

Finally, at the close of his cross-examination of appellant, the prosecutor and appellant were involved in this interchange:

> Q 38 Did the disappearance of your wife have anything to do with the fact she was about to blow the whistle on you as far as the police were concerned?
>
> HARRINGTON: We want to object to that, Your Honor, we want to object. There's no evidence to that effect.
>
> JUDGE: Well he can state whether he did or didn't or was or what.
>
> HARRINGTON: Show our exceptions.
>
> A. No, if I had been guilty of anything like that, I would have left the first t that I had heard of it. I would have left the country. You would still have been a hunting for me (T.E., p. 67).

It is apparent that the prosecutor continuously interjected irrelevant and highly prejudicial questions about Mrs. Cantrell's "disappearance" and death into appellant's trial. Appellant's trial counsel repeatedly objected to the references to the death of Mrs. Cantrell.

In Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972), this Court announced:

> The general and well-established rule in criminal cases in this state is that evidence which in any manner shows or tends to show that a defendant has committed another offense independent of that for which he is on trial is inadmissible. Keith v. Commonwealth, Ky., 251 S.W.2d 850 (1952). Id., at 588.

Appellant was entitled to be tried for the crime charged in the indictment and no other. Pankey v. Commonwealth, Ky., 485 S.W.2d 513, 526 (1972). The reason for this rule is apparent. As a general rule, evidence of marginally relevant

prior or contemporaneous criminal conduct of an accused is not admissible in a trial of the accused because of its tendency to prejudice and inflame the jury and possibly deprive an accused of a fair trial on the substantive crime for which he is charged. United States v. Geibhart, 441 F.2d 1261 (6th Cir. 1971).

In order that evidence of another crime be admissible at trial, it must fall within certain recognized exceptions to the general rule of inadmissibility:

> [T]he exception [is] that such evidence is competent to establish identity, guilty knowledge, intent, or motive, or when other offenses are so interwoven with the one under trial that they cannot be properly separated. Arnett v. Commonwealth, Ky., 470 S.W. 2d 834, 836 (1971).

The only exception even arguably relevant to the case at bar is the one for interwoven offenses. However, the prosecutor made no attempt at trial to show that the death of appellant's wife was related to the alleged rapes of appellant's daughter. In fact, when appellant's trial counsel moved to exclude all testimony related to "the missing Patsy Cantrell" (T.E., p. 31), the prosecutor offered this explanation for his references to Mrs. Cantrell's death:

> Well, Your Honor, the evidence has to show that this incident occurred, the last one, at the home of the defendant, and that his wife, and the mother of Judy, was not there present at the time. So you have to show the facts as they exist at the time that it happened (T.E., p. 31).

Appellant's counsel replied to the prosecutor's explanation:

> HARRINGTON: I don't see any requirements, I know of no requirements that could be proved that the mother wasn't there present, whether she was there present or not wouldn't legalize the act. But now regardless of that, they failed to connect it up, and move to exclude (T.E., p. 32).

The trial judge ruled:

> Well the Jury - they're sensible, intelligent people. I'll overrule that. Take an exception (T.E., p. 32).

Obviously, the prosecutor did not refer to Mrs. Cantrell's death because it was "interwoven" with the alleged rapes of Judy. During the interchange cited supra, the prosecutor said he wanted to show whether Mrs. Cantrell was present at the home during the last alleged rape. Mrs. Cantrell's presence or absence was irrelevant and, even assuming arguendo it were relevant, the prosecutor could have proved it by a simple question about whether she was at home at the time in question. In no event was questioning about her disappearance or death necessary or permissible. At other points in the trial the prosecutor used the time of Mrs. Cantrell's disappearance as a "reference point" for other events that occurred (See T.E., pp. 7,8,9,22,23,26, 27,43,44,51,62). The only apparent purpose of these questions was to emphasize the fact that Mrs. Cantrell disappeared and was found dead. Such improper emphasis on Mrs. Cantrell's death surely raised many questions in the minds of the jurors about the circumstances of her death.

Appellant was obviously prejudiced by the prosecutor's repeated reference to his wife's death. There was no conceivable legitimate reason for the constant interjection of evidence of appellant's alleged killing of his wife. Because of the prejudicial comments of the prosecutor, the trial judge was required to grant appellant's motion and discharge the jury panel. The trial court's failure to grant the requested relief mandates reversal of appellant's conviction.

II.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY RULING, OVER DEFENSE OBJECTION, THAT APPELLANT'S NINE-YEAR-OLD DAUGHTER WAS COMPETENT TO TESTIFY.

At the commencement of the initial presentation of the Commonwealth's case, the prosecution called appellant's nine-year old daughter, Judy Cantrell (T.E., p. 2). Before the prosecutor initiated his examination of the witness, the trial judge and the girl engaged in the following colloquy:

JUDGE: Judy, what grade are you in?

WITNESS: Third.

JUDGE: I believe you may have been informed - Do you understand what you're about to do when you hold your hand up? Who do you swear to tell the truth to?

WITNESS: To you.

JUDGE: To me, and who is it above us all that we swear to help us?

WITNESS: God.

JUDGE: Do you understand about God?

WITNESS: Yes.

JUDGE: And when you take an oath, you're swearing to God that you will tell the truth. And you understand what God can do or will do if we swear something wrong?

WITNESS: Yes.

JUDGE: All we want you to do now is to understand and to tell the truth. And if you don't understand the question don't answer it until you understand it, and then answer the question as it is, just as the truth (S.T.E., p. 1).

Immediately thereafter the following notation by the court reporter appears:

> Thereafter the witness was sworn - "Do you solemnly swear or affirm that such testimony you're about to give will be the truth, the whole truth so help you God" (S.T.E., p. 11).

As soon as the trial judge administered the oath to Judy Cantrell, appellant's defense counsel, out of the hearing of the jury, voiced the following objection:

> Show our objection to her testifying at this time, she fails to qualify, and was unable to answer to the Court on her own on any of the questions, and could not answer until they had been suggested (T.E., p. 2).

The trial judge disregarded appellant's objection and allowed the prosecutor to commence his direct examination of the Judy Cantrell, the prosecutrix (T.E., p. 2).

There is no unalterable rule measuring the competency of a witness because of his age, and the court should make inquiry into the child's qualifications and determine whether he is sufficiently intelligent to observe, recollect and narrate facts, and has a sense of obligation to speak the truth. Jackson v. Commonwealth, 301 Ky. 562, 192 S.W.2d 480, 481-482 (1946).

In the case at bar the trial judge's preliminary competency examination of Judy Cantrell was perfunctory and insubstantial. After learning that the witness was in the third grade, the trial judge asked the child to whom she would "swear to tell the truth" (S.T.E., p. 1). The child naively responded, "To you" (S.T.E., p. 1). Apparently unsatisfied with the child's answer, the trial judge then elicited from her the desired answer of "God" (S.T.E., p. 1). Following that response, the trial judge in an elaborate question told the witness that she understood "what God can do or will do if we swear something wrong" (S.T.E., p. 1)? To this leading question, Judy Cantrell,

answered with an unadorned "Yes" (S.T.E., p. 1). Significantly, the trial judge did not seek developed answers to his questions about "God" and God's connection to a "wrong" swearing, instead he settled for a simple "yes" (S.T.E., p. 1). The child was never asked to verbalize any response to the questions so that the trial judge could assess her "obligation to speak the truth."

Furthermore, the questions propounded by the trial judge, even answered affirmatively, would furnish little insight into the child's comprehension of his obligation to tell the truth. For example, the trial court asked, "And you understand what God can do or will do if we swear something wrong?" A child's affirmative response to this question reveals nothing. Nevertheless, the trial judge never asked the child to explain what she thought could happen if she failed to tell the truth. Obviously, a perusal of the record establishes that the trial judge's inquiry was woefully deficient in ascertaining the child's "sense of obligation to speak the truth."

Equally significant is the fact that the trial judge in his competency inquiry asked no questions which would enable him to evaluate whether the child was "sufficiently intelligent to observe, recollect and narrate facts."

This Court, in Meade v. Commonwealth, 214 Ky. 88, 282 S.W. 781, 783 (1926), stated that the true test of the competency of a child witness is "[w]hether the witness possesses sufficient intelligence to truthfully narrate the facts to which his attention is directed and about which he may be inquired."

In the case at bar, no interrogation of Judy Cantrell was made to determine if she had sufficient intelligence to truthfully narrate the facts about which she would be questioned. In view of the content and brevity of the competency inquiry

conducted by the trial judge, it is undeniable that the trial court lacked sufficient data with which to make a rational decision on the girl's competency to testify.

In Whitehead v. Stith, 268 Ky. 703, 105 S.W.2d 834, 837 (1937), this Court ruled that the trial judge erred in determining a six-year-old child to be a competent witness after conducting only a "brief examination of the infant witness as to his competency." The error was held to be "a palpable abuse of discretion" which "may well have been of prejudicial effect upon the substantial rights of the defendant." Id.

Even a review of the prosecutor's questioning of the child reveals that Judy Cantrell lacked sufficient intelligence to narrate truthfully what she had supposedly witnessed. During the course of the prosecutor's initial direct examination of Judy Cantrell, approximately eighty (80) questions were asked of the child and forty-eight (48) times she answered with either "yes," "uh-hu," "yeah," or with an affirmative nod (T.E., pp. 2-9). Interestingly, Judy Cantrell only answered "no" on four occasions (T.E., pp. 3,5,9). Such a method of testimony by a child witness is indicative of her incompetency as a witness. Under the procedure employed, the prosecutor related the account of the incidents and the witness gave her approval to the prosecutor's testimony.

"The question of a child's competency as a witness may be determined either from a preliminary examination or from his testimony before the jury, or both." Wharton's Criminal Evidence (13th Ed. 1972), Vol. II, §380. In the instant case the preliminary examination by the trial judge was so deficient that it cannot be used as an indicator of competency. Consequently, the only other barometer of Judy Cantrell's competency is her actual testimony. Analysis of the content of that testimony establishes that the trial court

lacked any factual basis for ruling, over defense objection, that Judy Cantrell was competent to testify.

In a similar factual situation, this Court in Moore v. Commonwealth, Ky., 384 S.W.2d 498 (1964), held that the trial court committed prejudicial error by allowing an eight-year-old child to testify without first carefully examining her to ascertain whether she was sufficiently intelligent to observe, recollect and narrate the facts and had a moral sense of obligation to speak the truth. This Court in Moore gave the following rationale for its decision:

> In the instant case the examination of the child was so superficial that no accurate appraisal of her mental capacity could be made. The questions propounded to her on voir dire examination should have elicited answers which would demonstrate her ability to observe, recollect and truthfully narrate the facts. Her subsequent testimony in chief being primarily monosyllabic responses to leading questions is of little assistance in determining her competency as a witness. Id., at 500.

Appellant submits that the decision in the Moore case is dispositive of the issue raised in this assignment of error. In the cited case the witness was eight years old and in the case at bar the witness was nine years old. In each case the preliminary examination of the child's competency was so superficial that no accurate evaluation of mental capacity could be made. Finally, the testimony of Judy Cantrell, like the child witness in Moore, was "primarily monosyllabic responses to leading questions." On the precedent of Moore, this Court should hold that the trial judge in the case at bar erroneously ruled Judy Cantrell competent to testify.

Since Judy Cantrell's "testimony" is the only evidence which support appellant's conviction on all three rape convictions, the prejudicial impact of the child's testimony is manifest.

Accordingly, on the basis of this error, appellant's conviction must be reversed.

III.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING THE PROSECUTION, OVER DEFENSE OBJECTION, TO INTRODUCE INTO EVIDENCE A NONTESTIFYING WITNESS'S ALLEGED OUT-OF-COURT STATEMENT, WHICH IMPLICATED APPELLANT, IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

During the prosecutor's direct examination of Goldie Mae Castle, Ms. Castle stated that on a particular weekend in the fall her sister, Patsy Cantrell, and her niece, Judy Cantrell, visited her at her home (T.E., pp. 20-21). The prosecutor then queried whether anything happened with respect to Judy during the visit (T.E., p. 21). Ms. Castle replied:

> Yeah, she was sitting there one day in a chair, Pat was, she kept saying "I don't know, I don't know". I asked her what she was talking about, and she would say, "I don't know" . . . (T.E., p. 21).

Appellant's counsel immediately objected to testimony about this conversation, but the judge overruled his objection and told Ms. Castle to "Go ahead" (T.E., p. 21). The witness continued:

> And I asked her what she was talking about, and she said - nothing, and she said, "I don't know, I don't know". And I said, "Pat, what in the world are you talking about.", and she said, "Somebody has been bothering Judy", and said that she looked at the baby and looked at Judy and they wasn't alike. And she wanted me to look at them, said there was something wrong with her but she didn't know what (T.E., p. 22).

Shortly thereafter, the prosecutor began another line of inquiry:

> Q 18 Well on that particular occasion that she showed you Judy, now I don't want you to say who, if anything was said, but did she tell you who had done it?
>
> A Yes, said she knows. . .

Q 19 Wait, wait just a minute now. Just answer my question, did she tell you who had done it?

A Yes (T.E., p. 22).

Ms. Castle's testimony relating both Mrs. Cantrell's words and the fact that she told Ms. Castle who "had done it" to Judy was hearsay evidence which was inadmissible. In Kinder v. Commonwealth, Ky., 306 S.W.2d 265 (1957), this Court analyzed hearsay evidence:

> Hearsay has been defined as evidence which derives its value not solely from the credit to be given to the witness upon the stand but, in part, from the veracity and competency of some other person. The hearsay rule signifies a rule rejecting assertions offered testimonially which have not been in some way subjected to the test of cross-examination under oath. It is an extra-judicial testimonial assertion which may be either written or spoken. The theory of the rule is that the many possible deficiences, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the fundamental test of cross-examination. [Citations omitted.] Id., at 266.

On numerous occasions this Court has held that hearsay evidence is incompetent and therefore inadmissible. Jackson v. Commonwealth, Ky., 296 S.W.2d 472, 474 (1956); Castle v. Commonwealth, Ky., 463 S.W.2d 120, 122 (1971); Hodges v. Commonwealth, Ky.,473 S.W.2d 811, 812 (1971); Pankey v. Commonwealth, Ky., 485 S.W. 2d 513, 527 (1972). No exception is made for a situation where the declarant of the hearsay statement is deceased. See Hamlin v. Commonwealth, 290 Ky. 669, 162 S.W.2d 196 (1942).

In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Supreme Court stated:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses

> in one's own behalf have long been recognized as essential to due process. Id., 410 U.S. at 294.

The Supreme Court added:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation and helps assure the "accuracy of the truth-determining process." [Citations omitted.] It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." [Citation omitted.] Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. [Citation omitted.] But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined. Id., 410 U.S. at 295.

It has been recognized in this Commonwealth that "the right of liberal cross-examination is a very substantial and important safeguard in the proper trial of criminal. . .cases." Harvey v. Commonwealth, Ky., 423 S.W.2d 535, 536 (1968).

Additionally, "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him" secured by the Sixth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Furthermore, "the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment." Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968).

In the instant case the trial judge's decision to allow Ms. Castle to present hearsay testimony to the jury not only placed incompetent evidence before the jury, it deprived appellant of his right to confront and cross-examine a witness against him.

The Supreme Court analyzed the function of the hearsay rule in Chambers v. Mississippi, supra:

> The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury. Id., 410 U.S. at 298.

See also Wharton's Criminal Evidence, Vol. 2, Hearsay Evidence, §265.

If the jury accepted as competent evidence Mrs. Cantrell's out-of-court statement that someone had been "bothering" Judy that factor could have persuaded the jury to give greater credence to the testimony of the very young Judy about the alleged rapes by her father (see Argument II wherein appellant alleges that Judy was not a competent witness). If the jury accepted the clear inference of Ms. Castle's assertion that Mrs. Cantrell said she knew who was bothering Judy, they would be likely to attribute the alleged sexual acts to appellant and to convict him on the basis of wholly unreliable hearsay evidence.

Since Mrs. Cantrell was not a witness at the trial, appellant could not confront and cross-examine her. Such a denial of these basic rights deprived appellant of due process and rendered his conviction constitutionally infirm.

As the Fifth Circuit Court of Appeals observed in Evans v. Dutton, 400 F.2d 826 (5th Cir. 1968):

> A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact. Id., at 830.

In the case at bar, the trial judge's ruling deprived appellant of his right of confrontation guaranteed by the Sixth and Fourteenth Amendments. In this context, the trial court's ruling substantially prejudiced appellant's right to a fair trial. Accordingly, appellant's conviction must be reversed.

## CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the lower court be reversed.

Respectfully submitted,

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